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Supreme Court of the United States

October Term, 1940.

No. .....

A. B. PITTMAN, TRUSTEE, NATIONAL COTTONSEED PRODUCTS CORPORATION, BANKRUPT,

Petitioner,

vs.

UNION PLANTERS NATIONAL BANK AND TRUST COMPANY, ET AL.,

Respondents.

BRIEF ON BEHALF OF RESPONDENT, THE AMERICAN NATIONAL BANK OF NASHVILLE, UPON PETITION OF A. B. PITTMAN, TRUSTEE, ETC., FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

PRELIMINARY STATEMENT.

In asking the allowance of a writ of *certiorari* petitioner assigns one error and presents a single question, to-wit, the validity of field warehouse receipts upon cottonseed issued by Nashville Warehouse & Elevator Corporation to National Cottonseed Products Corporation and pledged as

collateral security by the latter to the respondent banks, Chemical Bank & Trust Company, Union Planters National Bank and Trust Company, and the American National Bank of Nashville, for loans in cash made at the time of the pledging. The warehousing of cottonseed was done under the plan known as field warehousing.

Petitioner makes the astounding assertion that the facts as found by the Special Master, the District Court and the Court of Appeals are not binding on this court for the reason that certain evidentiary facts found by the Master are alleged to be contradictory to the decision finally reached. Petitioner states that the law of field warehousing was erroneously applied to the undisputed facts in the case and further denies, (and this in spite of an express holding of the Court of Appeals to the contrary) that concurrent finding of fact exists, and alleges further that there is a conflict between several of the Circuit Courts in regard to field warehousing.

The rules of law relative to field warehousing were reported by the Master and never disputed. These rules were argued to the District Court and Court of Appeals, with no disagreement between counsel, and so far as we are aware, there is no dispute regarding the law of field warehousing and none is pointed out by petitioner.

Petitioner now asks that the determinative findings of fact and conclusions of the Master, the decree of the District Judge affirming these facts and conclusions and the decree of the Court of Appeals affirming the District Court all be now overturned in this Court on the sole and unsupported allegation that certain selected fragmentary facts found by the Master control all courts reviewing this cause,

and failure to accept petitioner's construction of these fragmentary evidentiary facts is error.

Petitioner further alleges that the facts of this case are undisputed; that the undisputed facts are favorable to the contention of petitioner that no concurrent finding of fact exists, but only a misapplication of facts to law, or of law to facts. Petitioner disregards all findings and conclusions of the Master adverse to petitioner, all findings and conclusions of the District Court adverse to petitioner, and the findings and decree of the Court of Appeals, which are adverse to petitioner and expressly hold that there is a concurrent finding of facts. No question of law is now presented. The sole question is whether a few fragmentary quotations from the Master's findings are sufficient to overturn the remainder of the Master's findings and his own construction of his findings, affirmed by two reviewing courts. Petitioner in reality asks a new finding of facts.

The respondent, The American National Bank of Nashville, replies as follows to the petition and brief:

SUMMARY OF BRIEF.

There is only one single question presented in this case:

Petitioner, on page 14 of its brief states the question as follows:

> "Were the so-called field warehouse receipts on cottonseed pledged to respondents adequate to create a lien valid under state law as against the Trustee in Bankruptcy?"

A single error is assigned and that is the failure of the United States Circuit Court of Appeals for the Sixth Circuit to reverse the decree of the District Court and in holding

the warehouse receipts valid. This assignment is broken up into four different sections, marked a, b, c, and d, all of which allege failures to comply with the rules of field warehousing. These same objections were made before the Master and the two reviewing courts, and were so completely and effectively answered by the findings and conclusions of each, that the appropriate parts thereof, which are short, will hereafter be quoted, with comment thereon.

I.

RELIEF SOUGHT.

The relief sought is correctly stated by petitioner, which is to reverse the Court of Appeals and the District Court, and declare invalid warehouse receipts on cotton seed having an aggregate value of $1,335,980.22. The petitioner, who is a Trustee in Bankruptcy, contends that the pledging of the cottonseed representing this amount was invalid and that the proceeds of the cotton seed now in bank should be delivered to the Trustee in Bankruptcy, and distributed among general creditors. The respondent banks contend that the pledging of the cotton seed was in all respects valid, and that no infirmity existed in the system of field warehousing used.

The Master, the District Court, and the Court of Appeals, held in favor of respondent, and the opinion of the Court of Appeals appears in 118 Fed. (2d), 211.

II.

BASIS OF JURISDICTION OF THIS COURT.

This respondent, The American National Bank of Nashville, agrees that this Court has jurisdiction of the matter under Section 240 of the Judicial Code as amended, and rules and decisions of this court cited by petitioner.

III.

CONCISE STATEMENT OF THE CASE.

A brief history of the facts leading to this controversy is set out in the Master's report, and being unexcepted to, and relied on by both the District Court and Court of Appeals, a statement will be made based on the Master's report, with references to the volume of the record where such is found. The bankrupt, National Cotton Seed Products Corporation, was a Delaware corporation, owning originally some nineteen oil mills, with head office in Memphis, Tennessee. In 1929, the business of the company was greatly curtailed, and a system of field warehousing was established. Proctor & Gamble Company extended a substantial line of credit to the National, secured by a pledge of warehouse receipts on cotton seed. (Vol. 2, p. 357.)

Nashville Warehouse & Elevator Corporation was duly incorporated under the laws of Tennessee, with its principal office in Nashville, Tennessee, and was engaged in the general warehouse business, owning and operating warehouses at that point, and was engaged in field warehousing for other cotton seed oil mills. (Vol. 2, p. 341.) In 1931, National negotiated with the warehousing company for the purpose of warehousing its cotton seed, and a written agree-

ment was entered into on July 9, 1931, written leases of part of the premises were executed, and a form of warehouse receipt was adopted. The warehousing company employed a head or central warehouseman with an office at Memphis, who kept records of all transactions and issued all receipts. Local warehousemen were employed at the warehouses at each mill, and a fidelity bond was required. (Vol. 2, page 341.) Various other steps complying with the laws of field warehousing were taken by the parties and will be hereinafter referred to more in detail.

Financing was done by Proctor & Gamble for about four years, when an application was made to Reconstruction Finance Corporation for a loan, which was made, and the final loan with Reconstruction Finance Corporation was made July 1, 1934, for $2,250,000.00. (Vol. 2, p. 362.) At the same time, an additional line of credit was obtained from two of the respondent banks, Union Planters National Bank & Trust Company, and The American National Bank, for approximately $450,000.00, and the warehouse receipts on cottonseed were pledged to secure such, but subject to the pledge to Reconstruction. (Vol. 2, p. 363.) Other loans with one of these banks were arranged or in existence, which do not affect the issues now presented.

The loan made by Reconstruction Finance Corporation was taken over by Chemical Bank & Trust Company on December 28, 1934. (Vol. 2, p. 364.) Many controversies regarding the taking over of this loan resulted, but are not now material, and will not be further referred to.

In brief, the system of field warehousing employed was to lease seed houses to the warehouse company and store seed therein as rapidly as purchased by the National. The

warehouse company was in possession of the warehouses and acquired possession of the seed as delivered and then issued its receipts, which were pledged to respondent banks. These receipts were made readily available, and the National would each day pay off sufficient indebtedness and have receipts delivered to it, which were then presented to the warehouse company and cancelled. The seed called for by these receipts was delivered to the National, which crushed the seed and disposed of the product free of any lien. In some instances, warehouse receipts were released on trust receipts instead of payment. No question regarding this is now material.

Seed covered by warehouse receipts was not released to or used by the National, and in one instance, when receipts were not available for cancellation, the crushing operations of the National were suspended by the Warehouse Company as a result of a refusal to deliver seed.

As these facts are found and the findings will be stated in quotations hereafter, no further citations are made at this point.

IV.

LAW OF FIELD WAREHOUSING.

The Master, in his Finding of Facts, sets out the law of field warehousing as follows:

> "The property must be delivered to the Warehouse Company, and after delivery, the sole, open, actual, and exclusive possession of it must be retained by the pledgee. . . . In field warehousing, however, the required character of possession may be constructive, provided that the warehouseman has exclusive charge

and control of the property, and proper signs are posted evidencing this possession, and as notice to the public and creditors that the warehouseman is in the actual legal possession of the property."

Vol. 2, p. 365.

V.

FINDINGS OF THE MASTER.

The Finding of Facts in regard to the warehousing of cottonseed, by the Master is as follows:

"I think the record bears the finding as an ultimate fact that the nature of cottonseed, being bulky and expensive to handle and rehandle, the method of delivery of it upon purchase, into large seed houses, and the method of operating cottonseed oil mills, that there was, and I find, delivery of the seed to the Warehouse Company."

Vol. 2, p. 369.

"Due and proper significance must be given to the fact that the cottonseed, meal and linter houses were distinct and separate buildings from all other mill property. Adequate signs of a large size were placed upon these buildings, valid leases were taken, local warehousemen were placed in charge at each mill rendering daily reports to the Memphis office, and performed the duty, and this record discloses no instance in which they neglected to perform their duty; a central control warehouseman was in charge at Memphis, who received the daily reports with all necessary information of the operation at each mill, and who kept a central control record and account of the property on hand, and the warehouse receipts issued by him against it, and upon the whole record, I think that actual, open

and exclusive possession of the cottonseed was had within the requirements of the decisions.

"The record shows without dispute the chief control warehouseman at Memphis was active in the discharge of his duties, and was constantly supervising the whole system, and was in actual charge and control, standing guard between the National and the holders of warehouse receipts. There is no evidence that he was inactive or perfunctory in the performance of his duties. He was at all times present and performing them. On December 2, 1934, he ordered the mills to cease crushing seed when there was a shortage due to the failure of warehouse receipts to be received promptly from the Reconstruction Finance Corporation at Nashville and the mills closed until the receipts were received and cancelled.

"The control of the property was recognized and respected by the National.

"Upon consideration of all the evidentiary facts herein found and stated, I am unable to view them other than that the Warehouse Company had the necessary legal possession of the cottonseed houses, and the exclusive charge and control of the cottonseed contained therein."

Vol. 2, pp. 369-370.

The foregoing findings of the Master were bitterly challenged by the petitioner before the District Court, and that Court responded as follows:

VI

FINDINGS OF DISTRICT COURT

"The warehouse receipts on cottonseed are found to be valid and lawful in all respects. There was on hand with the warehouseman at the time the petition was filed sufficient cottonseed to meet and fulfill all outstanding cottonseed receipts. The finding and conclusions of the Master to the same effect are confirmed and the Trustee's exceptions thereto are overruled."
Vol. 1, p. 279.

VII

FINDINGS OF COURT OF APPEALS

The Court of Appeals held:

"The Master found, however, in finding sustained by the Court that the seed was delivered to the Warehousing Company; that adequate signs were placed upon the buildings; that local warehousemen were in charge at each mill, rendering daily reports to the central control warehouseman in charge at Memphis, who kept an adequate control record of the property on hand; and concluded upon the whole record that the warehousing company was in actual, open, and exclusive possession of the cottonseed. There was no evidence of an inactive or perfunctory performance of the duties of the warehouseman or of his aides, and the bankrupt at all times recognized his authority. There was never any actual shortage between cottonseed on hand and receipts outstanding. The apparent shortage that seemed to have been indicated by the reports was fully explained to the satisfaction of both Court and Master, as having been due to a delay in mail delivery of warehouse receipts from the mills to the main warehouse office in Memphis. When shortage did appear, the warehouseman at least on one

occasion required the closing of the mills until the receipts were received and cancelled.

"Upon these concurrent findings of Court and Master, it is our conclusion in the absence of clear demonstration of error, that the warehouse receipts were valid and afforded security, both to the Reconstruction Finance Corporation and to the banks. *Union Trust Co.* v. *Wilson*, 198 U. S., 530. The law of Tennessee does not require a contrary view. *Bank of Rome* v. *Hazleton*, 83 Tenn., 216. The Tennessee cases cited as authority for the doctrine that there may be no lien on personal property consumed by use or exhausted by sale are not applicable since there was no withdrawal here except upon surrender and cancellation of receipts. . . . While the Uniform Negotiable Receipts Act provides that the receipts shall state the location of the warehouse in which the goods are stored (*Williams Tennessee Code*, section 7533a) such alteration as is here complained of is permitted (Tenn. Code 1932, sec. 7544) when as found by the Master the holder has agreed to accept deliveries at other points . . . .

"The charges of collusion, fraud and bad faith, though made with great insistence by the Trustee, wholly fail of support and the Master so found. . . . The adjudication by the decree that the appellees are entitled to priority in the avails of cottonseed covered by their warehouse receipts must be sustained."

(See proceedings in the United States Circuit Court of Appeals for the Sixth Circuit filed in this cause June 7, 1941, Folio 4142-4143. Also 112 Fed (2d) 211, at page 213.)

The foregoing completely sustains the contention of respondents. The facts are undisputed, but they are in favor of respondents and not in favor of petitioner.

Petitioner again quotes fragments from a long report of the Master and omits many quotations favorable to respondents. The omitted quotations, as well as some that are quoted, sustain the finding of ultimate facts by the Master, affirmed by the reviewing courts. No citations to the record are made which sustain the alleged errors in the facts.

The second point of law on page 26 of the brief of petitioner complains of an unrecorded lien in favor of one or more creditors and a retention of possession with outward show of ownership. This contention ignores the findings that field warehousing is valid, that the warehouseman had complete control and exclusive possession of the property, and that adequate signs were placed on the property. It is next urged in this same section that National retained possession of the property, consumed it by use or exhausted it by sale. This is contrary to the facts, and as pointed out by the Court of Appeals, the prohibition against consumption by use does not apply to property which first must be delivered back to the consumer after surrender and cancellation of warehouse receipts, which was done in each case.

Under Section 10 of Points of Law (Brief, p. 31), petitioner again lays great stress upon the agreement between the parties for delivery of cottonseed at other points than where originally received. The law of Tennessee in this regard is as follows:

> "If the alteration was authorized, the warehouseman shall be liable according to the terms of the receipts as altered."
>
> Tennessee Code of 1932, Sec. 7544.

The authorization to alter is found both by the Master and the Court of Appeals as a fact. The change in the point of delivery was deliberately and rightfully agreed upon between the parties.

Other insistencies of petitioner contradict the established facts of this case, and would necessitate an entirely new set of facts as well as the concurrent findings of facts being set aside. Under present authorities the concurrent finding of facts of the Master and the two reviewing courts govern here unless error is pointed out in a convincing manner, which has not been done.

Petitioner has frequently cited and relied upon the case of *Security Warehousing Company* v. *Hand*, 206 U. S., 415, and the opinion in the same case in the Court of Appeals, 143 Fed. 32. Although each court stated that each case of field warehousing rests upon the facts presented and held the warehousing in that case insufficient, there was no departure from the rules laid down here and in the other cases cited. The holding was that under the facts of that case the rules of field warehousing were not complied with. The following appears in the opinion of the Court of Appeals in the Security case:

> "The Warehousing Company has never complied with Chapter 251, p. 415, Laws of 1899 of this State." (Wisconsin)
> 143 Fed., 33.
>
> "The receipts themselves would put the holders thereof on notice of these facts."
> 143 Fed., 40.
>
> "No signs were displayed to the passer-by. No business was sought from the public."
> 143 Fed., 40.

> "No signs on the building or on the door leading into it announced the presence of the Security Company."
> 143 Fed., 41.

The court held that the Warehouse Company could not legally operate in the State of Wisconsin that to avoid this difficulty the receipts were issued in Illinois, which was in itself illegal and this appeared on the face of the receipts; that there were no adequate signs, and no attempt to carry on a *bona fide* warehousing system, and this court denounced this attempt in the following language:

> "A mere device or subterfuge to enable the bankrupt to hypothecate the receipts and thus raise money upon secret liens on property in the possession of the pledgor and under its control."
> 260 U. S., 426.

VIII

REPLY TO ASSIGNMENT OF ERROR

As stated, a single error is assigned, which is divided into four subheads, a, b, c, and d. In reply to the subheads,—

(a) This subhead states neither the respondent banks nor the field warehouseman ever had actual, open, and exclusive possession of the cottonseed. It was never contended that the respondent banks did have any possession of the cottonseed. The respondent banks had possession of the warehouse receipts and sufficient has been quoted hereinabove to show that there is a concurrent finding that the field warehouseman did have actual, open, and exclusive possession of the cottonseed.

(b) This subhead states the warehousing did not contemplate actual change of possession, and that operations continued after warehousing as they had before warehousing. This is fully answered in the quotations from the various opinions heretofore made. The Master and the two reviewing courts held the warehouse company did have exclusive possession. As to operations, the warehousing was designed to permit continuous operation after warehousing by surrender of receipts for cancellation and delivery of the seed called for, which was the reason, and only reason operations were not interferred with. On the one occasion when receipts were not available the operation was interferred with and the mills were shut down. This is found both by the Master and the Court of Appeals, and their holdings are cited heretofore.

(c) This subhead states the respondent and bankrupt agreed that bankrupt should have the right to consume and use cottonseed and to sell and ship out products in the ordinary and usual operation of the business. This has been fully answered, and what is omitted from the alleged statement of fact is, that such permission was only upon the surrender and cancellation of warehouse receipts, thereby freeing the cottonseed from control of the warehouseman.

(d) This subhead states and challenges the agreement of holders of receipts to accept delivery of cottonseed at a point other than the original point of storage. This is expressly permitted by Tennessee Code of 1932, section 7544, and this question was decided by the Court of Appeals favorably to the respondents construing this section. This part of the opinion has been heretofore quoted.

In conclusion, this respondent submits that the law of field warehousing has been properly applied to the facts as found by the Master, the District Court, and the Court of Appeals, and that petitioner has not made a sufficient showing of any errors in this finding of fact to ask this Honorable Court to review the decision of the Circuit Court of Appeals, and therefore the writ of *certiorari* prayed for should be denied.

Respectfully submitted,

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